MOTION FILED

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No. 80-689

IN THE

Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, et al.,

Petitioners,

v.

CLARK VINCENT, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN OPPOSITION TO GRANTING CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN OPPOSITION TO GRANTING CERTIORARI

The Center for Law and Religious Freedom of the Christian Legal Society respectfully moves the Court, pursuant to Rule 42 of its Rules, for leave to file the accompanying brief amicus curiae in opposition to the petition for the grant of a writ of certiorari filed in the above captioned matter.

The consent of the parties to the filing of the attached brief has been sought by the moving party. However, while the respondents gave their consent, the petitioner refused such consent. Amicus, accordingly, proceeds by this motion.

As set out in the statement of Interest of Amicus Curiae found below, amicus feels that it is uniquely qualified to assist the Court in deciding the vital issues presented by the petition herein. Those issues touch upon core values of religious liberty which are a vital concern to amicus. It is not just the rights of this small group of students which are at issue in this case. Amicus is concerned about the ramifications of this case upon voluntary student initiated religious activity throughout this country. Unless the opinion of the Court of Appeals is upheld, this case will have drastic consequences for traditional student freedoms.

Amicus believes that it can add its national perspective to the issues in this case. Moreover, it will address issues which have not been adequately presented by the parties to date. These points include the nature of the religious command and obligation which motivates these students, this Court's company town precedents and its doctrine of accommodating neutrality in the Religion Clauses context.

Therefore, amicus strongly supports the opposition to the petition for certiorari and urges that this Court accept

and consider its accompanying brief, which describes and develops the bases and reasons for that support.

Respectfully submitted,

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Dated: November 25, 1980

BRIEF OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN OPPOSITION TO GRANTING OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys and law students Today it includes over 5,000 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect, promote, assure and enhance the freedom of Christians in the exercise of their faith which is guaranteed by the United States Constitution. The Center attempts to marshal the necessary legal skills and resources to enable the Christian Legal Society to act where the rights of Christians to exercise and express their faith are being improperly infringed. The Center's resources include, for example, prominent constitutional attorneys and an awareness of national trends. In pursuit of its goals, the Center has held numerous regional or national conferences providing continuing legal education by experts in fields such as constitutional law, federal practice and procedure, non-profit organizations, state and federal taxation, recent case developments, etc. The Center's national membership and professional resources thus enable it to focus attention upon unconstitutional incursions on religious freedom that would otherwise go unrecognized.

The Court in this case is faced with difficult and complex issues arising under various provisions of the First Amendment to the United States Constitution as applied to state-owned University property . Counsel for the Center participated as amicus curiae in the leading reported decision which addressed similar issues: *Keegan v. University of Delaware,* 349 A. 2d 14, 15 (Del. 1975) *cert. denied,* 424 U. S. 934 (1976). Moreover, the Center has lent its own constitutional expertise to various other legal, *see, e.g.,*

NLRB v. Catholic Bishop of Chicago, 440 U. S. 490, 491 (1979), and administrative proceedings. *See, e.g.*, Subcommittee On Oversight Of The U. S. House of Representatives Committee On Ways And Means, "Staff Report On IRS's Proposed Revenue Procedure Regarding The Tax Exempt Status Of Private Schools," 96th Cong., 1st Sess. (August 31, 1979), at 5-6. The Center believes this expertise will be of assistance to the Court. This brief also is filed to provide the Court with the views of amicus on aspects of the Religion Clauses which amicus believes have not been adequately addressed by the parties.

STATEMENT OF THE CASE

This is a unique student rights case in which this Court must decide a conflict between adult individuals and the State. The students in question are adults seeking to voluntarily exercise their religion. Neither coercion nor state sponsorship of religious activity is involved. Instead, these students seek to use facilities on the same basis as other student groups.

The University of Missouri-Kansas City is also the equivalent of a company town for its students. It is a home away from home, a complete social community for its resident students, but one where they apparently cannot share and experience their religious faith. The University is truly a company town. Thousands of adult students live there 24 hours a day on a typical far-flung university campus. These adults live their whole lives there. They eat, sleep, study, socialize and recreate there. Their town consists of residential buildings, streets, public and private areas, etc. The university is a "micro-society" for its students. Seldom if ever do they leave campus.

Religious belief and activity permeate all aspects of the lives of these students. (Chess affidavit ¶ 4, A31-35) Accordingly, since 1972 or 1973, Christian students have fully exercised the religious dimension of their lives in

their campus community. (*Id.* ¶ 6) This religious belief, practice and association cannot be compartmentalized or limited to a one hour worship service on Sunday. Instead plaintiffs and other Christian students, out of deeply held religious faith, have associated together in meetings where they share their faith and study how Christian teaching relates to their daily lives. This association of Christian students in a religious context is a basic and fundamental part of their lives. Christian students also have sought to explain to other students principles from *The Holy Bible* and the teachings of Jesus Christ. (*Id.* ¶¶ 3-7) While Christian students in the past have always been able to live their lives fully at the University, the defendants, by means of their regulation, have attempted to require them to artificially segment out or limit the religious dimension of their total lives. Religiously motivated students are not entitled to use university facilities on an equal basis, or on a "first-come, first-served" basis, with no usage restrictions, as are all other students.

There can be no question that the University is interfering with the exercise by plaintiffs of religious beliefs, sincerely held by them. Consequently, some students simply have had to abandon religious association. Meetings have been banned which are designed to give a Biblical framework to student life and to explain how students should deal with the everyday decisions which face them. Requiring these students to go off campus, where they never before have traveled, is deterring them in the exercise of their faith and is hindering them in communicating their religious beliefs with others. (*Id.* ¶ 11) While radical student groups can meet to discuss tearing down or violently overthrowing our constitutional form of government, these Christian students cannot meet to discuss the Sermon on the Mount (*The Holy Bible: Matthew* 5-7) or how our Judeo-Christian tradition teaches them to be good citizens.

ARGUMENT

Plaintiffs Proved a Direct and Substantial Infringement of Their Religious Liberties by the Actions of the Defendants and the Appeals Court Was Correct in Finding as a Matter of Law That No Compelling State Interest Outweighed the Vital Religious Liberties at Issue.

A. The Religious Liberties at Issue Include the Rights of Religious Association, Evangelization and Speech.

As the facts undisputably established, these adults seek to share with others the good news of their religious faith and to associate frequently with like minded students for religious purposes. For 2,000 years Christians have been trying to share their faith in the communities where they live. *See The Holy Bible: Acts Of The Apostles* 2:14-41; 5:42 (King James). These same Christians have been following the great commission given them by Jesus Christ: to go out and share his message. *The Holy Bible: Matthew* 28:19-20; *Mark* 16:15 (King James). Their faith requires them to be witnesses to the living Jesus Christ . *The Holy Bible: Acts Of The Apostles* 1:8 (King James). In other words, they must witness and evangelize others as a matter of religious obligation. For 2,000 years Christians also have been worshipping and associating in their homes and in their home communities. *See The Holy Bible: Acts Of The Apostles* 2:46 (King James). These commands are central to plaintiffs' lives, they integrate and permeate their lives.

The free exercise clause of the First Amendment is a shield against governmental interference with these historical religious practices. That clause has been called "the favored child of the First Amendment."[1] Plaintiffs' religious activity is at the very center of the practices protected by the free exercise clause. For example, as long

1. Pfeffer, "The Supremacy Of Free Exercise." 61 *Geo. L. J.* 1115, 1142 (1973).

ago as 1943, this Court said in *Murdock v. Pennsylvania*, 319 U. S. 105, 110:

> spreading one's religious beliefs or preaching the Gospel . . . through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types.[2]

Significantly, the Court there found that—

> [t]his form of religious activity occupies the same high estate under the First Amendment as do worship in the Churches and preaching from the pulpits.

Id. at 109. Moreover, this Court in analogous situations has repeatedly affirmed the right of persons freely to disseminate religious doctrine in their communities in an effort at the communication of religious ideas. *See Largent v. Texas*, 318 U. S. 418 (1943); *Jamison v. Texas*, 318 U. S. 413 (1943); *Cantwell v. Connecticut*, 310 U. S. 296 (1940). Similarly, lower courts recently have upheld the rights of individuals to distribute religious literature and to proselytize in residential areas as well as on city streets. *See, e.g., Cherris v. Amundson*, 460 F. Supp. 326 (E. D. La. 1978); *Smith v. City of Manchester*, 460 F. Supp. 30 (E. D. Tenn. 1978). Courts even have held that individuals have the right to fully exercise their religion in federal buildings, *U. S. v. Boesewetter*, 463 F. Supp. 370 (D. D. C. 1978), at a municipal airport, *International Society For Krishna Consciousness, Inc. v. Collins*, 452 F. Supp. 1007 (S. D. Tex. 1977), and at a state fair, *International Society for Krishna Consciousness, Inc. v. Bowen*, 600 F. 2d 667 *cert. denied*, 444 U. S. 963 (1979).

The facts of this case bear a significant analogy to the above decisions, both because of the religious liberties involved and the geographic location of their exercise. In those cases religious liberty was exercised in public places, in the community. There certainly is a strong resemblance

2. *See The Holy Bible: Acts Of The Apostles* 20:20 (King James).

to municipal airports, parks, public buildings and residential areas and this university which serves as a "micro-society" for plaintiffs. The defendant university is undeniably a self-contained "city." First Amendment rights are fully available in the "functional equivalents" of cities. *Marsh v. Alabama*, 326 U. S. 501 (1946); *Tucker v. Texas*, 326 U. S. 517 (1946); *Lloyd Corp., Ltd. v. Tanner*, 407 U. S. 551 (1972).[3] Relying upon this statement of the law, the leading decision in *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975), *cert. denied* 424 U. S. 934 (1976), recognized a vital fact of university life. Analyzing this Court's company town cases, that court said—

> In *Tucker v. Texas*, 326 U. S. 517 (1946), a freedom of press and religion case, the Supreme Court upheld the right of an ordained minister of Jehovah's witnesses to distribute religious literature in a village owned by the United States, notwithstanding a request to leave by the manager of the village pursuant to his purported authority by federal regulation and Texas criminal law. The Court noted the village "had the characteristics of a typical American town." The case thus has similarities to the University owned dormitory situation here.

Id. at 18. Merely because the university serves an educational function, it should not be immunized from the full scope of the free exercise clause because it is the functional equivalent of a town.[4] In *Healy v. James*, 408 U. S. 169, 180 (1972), this Court noted that—

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3. The university has all the characteristics of the company towns found in *Marsh* and *Tucker*, residential buildings, streets, etc. 326 U. S. 502-03.

4. Paraphrasing the words of Justice Black in *Marsh v. Alabama, supra*, at 508, it can certainly be said of the multitudes in higher education throughout this country: "Many people in the united States live in [universities]. These people, just as residents of municipalities, are free-citizens of their State and country. . . . There is no more reason for depriving these people of the liberties

> [S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate." . . . Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Because the defendant university is a 24 hour community for these students they should not be forced to artificially segment out the religious dimension of their lives from all other aspects of their human activity. The university is the home community for these Christian students for four years of their lives. They cannot be expected to deny and compartmentalize their Christianity for these vital four years. The Court of Appeals recognized these facts and thus gave the proper weight to the historic and fundamental religious liberties at issue in this case.

B. A Direct and Substantial Burden Has Been Placed on the Exercise of Religious Liberty.

If the "effect" of governmental action is directly, indirectly or incidentally to impede religious practice, this violates the free exercise clause. *Wisconsin v. Yoder,* 406 U. S. 205, 220 (1972); *Sherbert v. Verner,* 374 U. S. 398, 404 (1963). The facts set out above establish that the religious liberty of plaintiffs was significantly affected. These students have been hindered in communicating religious beliefs, in associating and in obeying the commands of *The Holy Bible.* Many students are simply no longer able to obey religious obligations.

The constitutional significance of this denial of interpersonal communication was discussed in the leading stu-

4. (Cont'd.)

guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." (footnotes omitted)

dent rights case of *Tinker v. Des Moines School District*, 393 U. S. 503 (1969). This Court there recognized that "personal intercommunication among the students . . . is . . . an inevitable part of the process of attending school; it is also an important part of the educational process." *Id.* at 512. Personal intercommunication extends from the classroom into the cafeteria, onto the playing fields and throughout a campus. *Id.* at 512-13. Education occurs not just in a classroom but by means of intercommunication during the total experience of university life.[5] *Healy v. James, supra,* reemphasized the importance of interpersonal communication on campus. The defendants there argued that the students involved could still meet as a group and distribute material off campus. *Id.* at 182-83. But this Court found that—

> Denial of official recognition posed serious problems for the organization's existence and growth . . . most importantly—non-recognition barred them from using campus facilities for holding meetings.

Id. at 176. See *id.* at 181-83. *Healy* is extremely important to the case at bar because of its recognition of the serious problems for an organization's continued existence and growth which arise from the denial of the opportunity to use on-campus facilities to hold meetings. In *Gay Students v. Bonner*, 509 F. 2d 652 (1st Cir. 1974), the court noted that the analysis in *Healy* focused upon "the practicalities of human interaction."

> The ultimate issue at which inquiry must be directed is the effect which a regulation has on organizational and associational activity, not the isolated and for the most part irrelevant issue of recognition *per se*.

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5. Students at the defendant University are being denied true education if they are led to believe that there is no religious dimension to American society and culture and if religiously motivated students are denied the opportunity to speak about that dimension. *See Illinois Ex Rel. McCollum v. Board of Education*, 333 U. S. 203, 236 (1948).

Id. at 659. The effect on associational activity by these religious students is clear from the record. They are being denied the right to associate and numerous students are simply *not* associating at any location whatsoever. This denial of the opportunity to communicate religious ideas is a direct and substantial infringement of the First Amendment.[6]

Neither is the constitutional balancing affected, as the trial court erroneously believed, by whether the practice involved is central to a particular religion or not, or whether the infringement causes the destruction or disintegration of a specific religion. The free exercise clause was designed to protect the conscience of individuals. It does not merely protect central tenets of particular religions. *Lewis v. Califano,* 616 F. 2d 73, 79-81, (3d Cir. 1980). Instead, the sincere religious belief of any individual is protected by the First Amendment. *Id.* at 81. Furthermore, an examination of the leading religious liberty cases illustrates that the free exercise clause applies to all types of religious beliefs. In *Gillette v. United States,* 401 U. S. 437, 439 (1971), this Court entertained a free exercise claim derived from a "personal decision" "based on a humanist approach to religion" which opposed participation in particular wars. Thus, personal, non-institutional belief, not central tenets of

6. Reliance on the belief-action dichotomy is also misplaced. Any distinction has been greatly diminished in recent years. This Court in *Sherbert v. Verner, supra,* at 403, in considering the belief-action distinction, noted that the "conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." Any allegation that the peaceful activities of plaintiffs are a substantial threat to public safety, peace or order fails both factually and legally. In *Wisconsin v. Yoder, supra,* at 219-20, the Court was even more emphatic. "[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause . . . [B]elief and action cannot be neatly confined in logic-tight compartments." *Accord* L. Tribe, *American Constitutional Law,* at 837-39, 853-54 (1978); Note, "An Expansion Of The Free Exercise Clause: Wisconsin v. Yoder", 37 *Albany L. Rev.* 329, 331 (1973).

a religion, was recognized as legitimate. In the companion case of *Negre v. Larsen,* 401 U. S. 437, 440-41 (1971), this Court did not attempt to determine whether Negre's particular Roman Catholic belief ranked high or low among the tenets of Catholicism; whether any other Catholics in fact shared this view or if the Catholic faith would be destroyed. The Court permitted the free exercise claim and went on to other steps in the constitutional analysis. In *Sherbert v. Verner, supra,* at 399 and n. 1, the Biblically based belief that work should not be done on the Sabbath was protected. But work on the Sabbath would not have resulted in the destruction or disintegration of the religion at issue. The Appeals Court was correct then in its identification of the substantial infringement of religious liberty which has been proven.

C. No Compelling State Interest Can Be Found Outweighing the Direct and Substantial Infringement of Religious Liberty Which Was Proven Below.

As *Sherbert v. Verner, supra,* at 406, and *Wisconsin v. Yoder, supra,* at 215, clearly state, in this highly sensitive constitutional area no showing of a mere rational relationship to some "colorable state interest" suffices. Only "the gravest abuses, endangering paramount interests" can permit limitation of free exercise.

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Wisconsin v. Yoder, supra, at 215. A court should not accept "sweeping" claims but instead should "searchingly examine the interests that the state seeks to promote." *Id.* at 221. In Yoder the state's interest in its system of compulsory education and its interest in acting as parens patriae were insufficient. In *Sherbert v. Verner,* the integrity of a state unemployment compensation plan was not enough. In *Ohio v. Whisner,* 351 N. E. 2d 750 (Ohio 1976), the state's interest in insuring certain mini-

mum curriculum and faculty standards in private schools was inadequate. *See NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490 (1979). On the other extreme, the conscientious objector cases demonstrate that the nation's unassailable interest in self defense and the efficient conduct of war are substantial enough to outweigh the religious liberty interest found in those cases. *Gillette v. United States, supra; Johnson v. Robison,* 415 U. S. 361 (1974).

The basic finding of the district court was that the compelling state interest found in the establishment clause outweighed any religious or other liberty involved herein. The Court of Appeals, however, correctly reweighed the scales because of errors in identifying, among other things, the nature of the religious liberty interest and the degree of its infringement. Once that reidentification is made, amicus suggests that either no establishment clause values are endangered or any potential danger is outweighed by the nature of the free exercise values placed in the constitutional balance.

Any argument that the religious student in public education has few if any rights on state property ultimately relies upon the school prayer and bible reading cases of *Engle v. Vitale,* 370 U. S. 421 (1962), and *School District of Abington Township v. Schempp,* 374 U. S. 203 (1963). But, unless the religious segment of our student population is to be disenfranchised from the full protection of the First Amendment, this argument is faulty.[7] The "wall of separation between Church and State" should not be built around voluntary student initiated religious activity by adults on a state university campus. Indeed, this Court has recognized that its "metaphor of a 'wall' or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis." *Gillette v. United States,*

7. *See generally* Toms and Whitehead, "The Religious Student In Public Education: Resolving A Constitutional Dilemma," 27 *Emory L. J.* 3 (1978).

401 U. S. 437, 450 (1971).[8] The "wall" metaphor should not be allowed to confuse the facts and issues herein.

It would strain the Constitution to argue that the framers of the establishment clause intended to prohibit voluntary student initiated religious activity between consenting adults on a state university campus. The purposes of the establishment clause are far different from the position taken by the defendants. In Chief Justice Burger's words:

> [F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.

Walz v. Tax Commission, 397 U. S. 664, 668 (1970). This case has no such elements of government support for religion. This Court should not lose sight of the "common sense" of the matter. *Zorach v. Clauson, supra,* at 312. This action involves voluntary activity between consenting adults in their social community, not sponsorship,[9] financial support and active involvement in religion.

(1) Governmental Neutrality

Abington Township v. Schempp, supra, at 225, stated that the government may not affirmatively oppose or show hostility to religion, thus preferring those who believe in no religion over those who do believe in religion. Considering the purposes behind the Religion Clauses, this Court has insisted upon neutrality with respect to the government's stance toward religion. In *Walz v. Tax Commission, supra,* at 676, this Court noted:

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8. *Accord Zorach v. Clauson,* 343 U. S. 306, 312 (1952).

9. As the Appeals Court correctly observed, mere tolerance of voluntary student initiated religious activity is not sponsorship in a constitutional sense. The University merely has to publicly disavow sponsorship and make it clear it is just permitting the exercise of constitutional rights. *See Allen v. Morton,* 495 F. 2d 65, 67, 90-91 (D. C. Cir. 1973).

> Few concepts are more deeply imbedded in the fabric of our national life, beginning with pre-revolutionary colonial times, than for the government to exercise at the very least this kind of *benevolent neutrality* toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.

See id. at 669. (emphasis added) As long ago as *Zorach v. Clauson, supra,* at 314, Justice Douglas stated that government cannot be indifferent to the religious element of our society.

> That would be preferring those who believe in no religion over those who do believe. . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

See Wisconsin v. Yoder, supra, at 234 n. 22. The modern "purpose", "effect" and "entanglement" formulation of the neutrality test is found in *Lemon v. Kurtzman,* 403 U. S. 602, 612 (1971) and *Walz, supra,* at 674. But the danger in applying tests in this sensitive constitutional area lies in the fact that even in *Lemon* itself, this Court acknowledged the difficulties it faces in drawing clear lines of demarcation. *Accord, Walz, supra,* at 668; *Committee For Public Education v. Regan,* — U. S. —, 100 S. Ct. 840, 851 (1980). This Court's cases under both Religion Clauses are simply *not fungible,* but depend upon their own particular facts and circumstances. The real test regulating student activity in the schools is that found in *Tinker v. Des Moines Independent School District, supra:* material and substantial disruption of the educational function. However, even applying the *Lemon* test, plaintiffs' religiously motivated actions do not violate the establishment clause.

The acceptance of an argument severely curtailing all religiously associated activity on campus oversteps the bounds of neutrality and enters the realm of hostility. Governmental neutrality means only that the university cannot encourage or discourage activity but it can tolerate it. Such a position has a "secular purpose" because it permits the communication of ideas, which is the preeminent secular purpose of education. Student organizations also are recognized and allowed to operate in order to foster educational goals such as leadership and communication skills. These are both legally acceptable purposes. It must be kept in mind that it is the "purpose" of the university, not that of the student, which is the focus. The primary "effect" of such a policy also has a primarily secular effect. It advances education by allowing students to meet and exchange ideas and share mutual interests. *Keegan v. University of Delaware, supra,* at 16. That these ideas, from the student's viewpoint, are religious is of no consequence. *Id.* Nor should entanglement ordinarily be involved if the school is not sponsoring or intimately regulating the activity. *See* Toms and Whitehead, *supra,* at 24-26.

All these students ask is that they have the same right of access to University facilities as any other student, on a first-come first-served basis. They seek no preference, just neutrality towards them. When a public facility is open on a non-discriminatory basis to both believers and nonbelievers "there is no 'establishment of a religion,' and there cannot be a meaningful perception of one." *O'Hair v. Andrus,* 613 F. 2d 931, 934 (D. C. Cir. 1979); *see Keegan v. University of Delaware, supra,* at 16.

(2) This Court's Education Cases

The fact is that precisely four opinions—no more, no less—have been handed down by this Court in cases having to do with either public school sponsorship or accommodation of religious activities. None of them dealt with truly voluntary "student initiated" activity between con-

senting adults at the university level. None of their facts even remotely resemble this case. In three decisions the Court ruled that public schools themselves cannot actively and affirmatively "sponsor" religious activities. The fourth held that no sponsorship is found in public school accommodation of the religious interests of students.

In *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), *Engle v. Vitale*, 370 U. S. 421 (1962), and *Abington Township v. Schempp, supra*, the religious activities were (a) originated by the government and (b) curricular in nature. In each it appeared to very young school children that the state stood behind the ideological content of the doctrinal teaching or exercise. In each the government was *sponsoring* religion; and that is state action "respecting an establishment of religion" which is forbidden by the First Amendment.[10]

But under many circumstances the state may "accommodate" an activity which it can not sponsor. This Court's fourth decision illustrates this principle. In *Zorach v. Clauson, supra*, the arrangement was like that in *McCollum* except the weekly religious instruction was not held in the classrooms and the instructors were not under the control of the school. This was held not to be an establishment of religion. The circumstance that *Zorach* approved off-campus activities similar to those which *McCollum* forbade on campus has given rise to the simplistic notion that the only operative facts under the establishment clause are the time and place of the activity. However, Mr. Justice Brennan's concurring opinion in *Schempp,*

10. Non-curricular religious activity, in the form of religious invocations and benedictions at high school graduation ceremonies, has been approved by the courts. *Grossberg v. Deusebio*, 380 F. Supp. 285 (E. D. Va. 1974); *Wood v. Mt. Lebanon School District*, 342 F. Supp. 1293 (W. D. Pa. 1973); *Weist v. Mt. Lebanon School District*, 320 A. 2d 362 (Pa. 1974). Religious prayer among consenting adults to start public meetings also has been sustained. *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979); *Lincoln v. Page*, 241 A. 2d 799 (N. H. 1968).

supra, rejected this concept, pointing out, *id.* at 262, that the "deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects while the *Zorach* program did not."

> To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and the capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teachers for the enhancement of secular instruction.

Id. at 263. In a concurring opinion in *McCollum*, *supra*, at 230, four Justices foreshadowed this analysis and stated that the vice of the program was that "the momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning." These decisions, then, do not support any proposition which would deny consenting adult students the right, outside of classes, to meet voluntarily for religious purposes anywhere in the university community.

(3) This Court's Public Property Cases

There are other cases which deal with religious activities on public property. They did not find that state accommodation of religious activity on public property constituted a violation of the establishment clause. *See, e.g., Poulos v. New Hampshire*, 345 U. S. 395 (1953), *Tucker v. Texas*, 326 U. S. 517 (1946); *Kunz v. New York*, 340 U. S. 290 (1951); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Fowler v. Rhode Island*, 345 U. S. 67 (1953). An establishment clause issue had been raised in these cases. It was raised in *Kunz v. New York* in the dissenting opinion of Mr. Justice Jackson who felt that the decision in *McCol-*

lum v. Board of Education, supra, had held that "the Constitution will not suffer tax supported property to be used to propagate religion." 340 U. S. at 311 n. 10. In *Saia v. New York,* 334 U. S. 558, 569 (1948), the same argument was rejected.

Nor can it be argued that these cases were decided before the establishment clause doctrine was framed by this Court. *McCollum* was decided before any of them and *Zorach v. Clauson, supra,* was decided before *Poulous* and *Fowler.* Furthermore, as recently as 1972, this Court cited, discussed and primarily relied upon *Niemotko* and *Fowler* in a case involving both First Amendment freedooms on public property as well as the equal protection clause, twice pointing out that those cases involved religious activities on public property. *Police Department of Chicago v. Mosley,* 408 U. S. 92, 96-97 (1972).[11]

(4) The Doctrine of Accommodating Neutrality Resolves Any Balancing of Interests in Favor of the Plaintiffs.

Assuming that establishment clause considerations are involved in this case, the Court must weigh and balance all the other constitutional rights which are at issue including the free exercise of religion, freedom of association and speech. Since the students have proven that their actions are motivated by religious conviction and that their religious liberty has been constitutionally burdened, see *Sherbert v. Verner, supra,* the command of their religious convictions must be weighed on the scales of the

11. Entanglement could be raised in this context by a contention that permitting religious activity on public premises necessarily fosters an excessive entanglement by the state with religion because the state will end up having to allocate time and space. But the specter of allocation of time to "256 recognized denominations," as pertaining to the limited park facilities of Lockport, New York, was raised by Mr. Justice Jackson in his dissenting opinion in *Saia v. New York, supra,* at 570, and was apparently rejected by this Court.

accommodating neutrality principle which has developed under the Religion Clauses. Accommodating neutrality is the doctrine whereby this Court has protected free exercise claims from establishment clause challenges. Whenever the two clauses conflict free exercise claims must supercede establishment clause considerations. See *Sherbert v. Verner, supra,* at 409-10; *Wisconsin v. Yoder, supra,* at 234 n. 22. In any such conflict free exercise values must be preserved. Kurland, "The Supreme Court, Compulsory Education, And The First Amendment's Religion Clauses," 75 *W. Va. L. Rev.* 213, 244 (1973). Professor Tribe of Harvard has found that this conclusion accords with the intent of the framers of the Constitution. Tribe, *American Constitutional Law,* at 819 (1978).[12] When the two religion clauses overlap, a zone of intersection is created. This Court's recognition that free exercise values must be paramount in such cases has been characterized by Professor Tribe as the identification of "the zone which the free exercise clause carves out of the establishment clause for permissible accommodation of religious interests." Tribe, *supra,* at 823. In his words, this is the "zone of permissible accommodation" of establishment clause concerns to free exercise values.

The principle of accommodating neutrality was well stated by Justice Douglas in *Zorach v. Clauson, supra,* at 313-14 (emphasis supplied).

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs.

In *Walz v. Tax Commission, supra,* at 669, this Court noted—

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12. *Accord, Valent v. N. J. State Bd. of Ed.,* 274 A. 2d 832, 837 (N. J. Super. 1971)

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

(Emphasis supplied). Benevolent neutrality or amiableness, not hostility, should be the attitude towards the free exercise claim of these students. Perhaps the accommodation shield is best illustrated in *Wisconsin v. Yoder, supra.* In upholding the religious beliefs involved there this Court ruled that the recognition of an exemption for the Amish from the state's compulsory education system did not constitute an impermissible establishment of religion, but instead accommodated their religious beliefes and reflected the government's obligation of neutrality. *Id.* at 234 n. 22; *see* 220-21. The various concurring opinions in *Schempp, supra,* also discuss accommodation of religious values.

The Supreme Court of Delaware directly relied upon the accommodation principle in rejecting an establishment clause challenge to the student free exercise rights infringed in *Keegan v. University of Delaware, supra,* at 16. The significance of the accommodation principle also was reiterated in *O'Hair v. Andrus, supra.*

A panoply of other rights including free speech, association, etc., in addition must be carefully weighed in the balance by this Court. This is not the extraordinary case, bordering on state sponsorship of religious activities, or outright church interference on the university campus, which could outweigh the exercise by students of legitimate constitutional rights. This is a pure student rights case among consenting adults. As such the state, as a matter of constitutional law, cannot prove a compelling state interest.

CONCLUSION

These students are entitled to the same rights which Thomas Jefferson, the author of the famous "wall of separation of Church and State" phrase, successfully proposed to the Board of Visitors of the University of Virginia when he was its director: that sectarian "instruction" and "worship" for students be accommodated on the University campus. 19 *The Writings Of Thomas Jefferson,* Andrew A. Lipscomb ed. [Washington, D. C.: The Thomas Jefferson Memorial Association, 1903-04], pp. 408, 411, 413-16. The Court of Appeals put to rest the simplistic and legally erroneous idea that governmental ownership and control of property generally, and educationally employed property in particular, is the sole criterion by which private voluntary religious activity is measured on the scales of the Religion Clauses of the First Amendment. That Court ruled that the religiously motivated student is not made a second class citizen merely by his enrollment in a State university. That judgment should not be disturbed. Accordingly, certiorari should be denied.

Respectfully submitted,

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Dated: November 25, 1980

CERTIFICATE OF SERVICE

STATE OF DELAWARE
COUNTY OF NEW CASTLE } *ss.:*

BE IT REMEMBERED, on this day of November, A. D., 1980, before me, the Subscriber, a Notary Public for the State and County aforesaid, personally appeared, Thomas Stephen Neuberger, who being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the within Motion for Leave to File Brief Amicus Curiae and Brief of the Center for Law and Religious Freedom of The Christian Legal Society as Amicus Curiae in Opposition to Granting of Certiorari to the following attorneys:

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THOMAS STEPHEN NEUBERGER

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Notary Public